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TREASURY FOR SARA GRAY
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SUBJECT: NICARAGUA: 2008 SPECIAL 301 REVIEW

REFS: A) SECSTATE 9475, B) 07 MANAGUA 2654, C) 07 MANAGUA 2616

SUMMARY AND INTRODUCTION

¶1. (SBU) Nicaragua's participation in the United States - Central America - Dominican Republic Free Trade Agreement (CAFTA-DR) required the passage of legislation making the country's framework for the enforcement and protection of intellectual property rights (IPR) consistent with U.S. and emerging international standards. However, the Government of Nicaragua (GON) subsequently passed legislation that repealed provisions that had strengthened criminal penalties for IPR theft and allowed the GON to initiate ex officio IPR investigations, a CAFTA-DR requirement. Moreover, as the Pharmaceutical Research and Manufacturers of America (PhRMA) raises in its 2008 Special 301 Submission, patent linkage and test data protection for pharmaceutical products, also CAFTA-DR requirements, remain unimplemented.

¶2. (SBU) Nicaragua's failure to meet CAFTA-DR IPR commitments is a serious concern. However, CAFTA-DR is still young, and many GON officials lack familiarity with IPR issues. The fact is that GON officials and industry are cooperating to combat piracy, trademark infringements, and copyright violations. In 2007, the GON conducted 20 raids and the police seized 58,547 pirated DVDs, 21,629 CDs, 13 computers, 3 multi-purpose copiers, and other audiovisual equipment worth approximately \$123,000. Officials at the Ministry of Trade, Industry, and Development (MIFIC) are interested in meeting CAFTA-DR IPR commitments. On February 22, after receiving notification that PhRMA had named Nicaragua in its 2008 Special 301 Submission, MIFIC Minister Solorzano wrote Health Minister Gonzalez seeking his cooperation on test data protection.

¶3. (SBU) For these reasons, post would like to work with GON officials over the course of the year to find a way to resolve Nicaragua's IPR issues. In lieu of naming Nicaragua to the 2008 Special 301 Watch List, we recommend that a senior Washington-based official pen a letter to President Ortega outlining our IPR concerns in terms of CAFTA-DR commitments. We believe that naming Nicaragua to the Watch List this year could result in a negative political reaction that would complicate our efforts to help Nicaragua comply with its CAFTA-DR IPR commitments.

CAFTA-DR IMPROVES LEGAL FRAMEWORK

¶4. (SBU) CAFTA-DR made Nicaraguan standards for protection and enforcement of IPR consistent with U.S. and emerging international standards. To implement the agreement the GON passed several new IPR laws that 1) provide state-of-the-art protections for digital products such as software, music, text and videos; 2) afford

stronger protection for patents, trademarks and test data, including an electronic system for the registration and maintenance of trademarks; and, 3) deter piracy and counterfeiting. Major IPR laws include the Patent, Utility Model, and Industrial Design Law (amended 2007/634); the Copyright and Related Rights Law (2006/577); the Satellite Signal Programming Protection Law (amended 2006/578); and the Trademark and Other Distinctive Signs Law (amended 2006/580).

NEW CRIMINAL CODE UNDERMINES CAFTA-DR REFORMS

15. (SBU) Unfortunately, recent reforms to the new Criminal Code would weaken IPR enforcement and undermine legislation passed in 2006 to implement CAFTA-DR. On April 16, 2006, the GON approved amendments to the Copyright Law to add a provision that the Prosecutor General's Office could investigate an IPR crime ex officio, without a formal complaint. However, a new Criminal Code approved on November 13, 2007, repeals this provision. The code awaits publication.

16. (SBU) The Ortega administration has also weakened penalties for copyright violations under the new Criminal Code. In 2006, amendments to the Copyright Law stiffened penalties for IPR crimes, including fines ranging from 3,000 to 25,000 cordobas (\$160 to \$1,315) and prison sentences of up to two years. The new Criminal Code approved on November 13, 2007 adopts aspects of Sweden's penal code to calculate the fine for an IPR offender based on one-third of that person's daily salary multiplied by 90 to 150, depending on the severity of the crime. The new Criminal Code also reduces prison sentences to a maximum of one year.

17. (SBU) The new Criminal Code will come into effect once published in the Official Gazette, a process that has been delayed as part of President Daniel Ortega's power struggle with former President Arnoldo Aleman over unrelated provisions of the new Criminal Code (Ref C). A MIFIC official responsible for CAFTA-DR implementation was surprised to learn that the new Criminal Code would repeal legislation allowing ex officio IPR investigations and weaken penalties for copyright violations; he clearly understood the implications for CAFTA-DR compliance.

TEST DATA PROTECTION AND PATENT LINKAGE

18. (SBU) PhRMA's 2008 Special 301 Submission claims that the GON has yet to implement an effective system for test data protection and patent linkage for pharmaceutical products, as required by CAFTA-DR.

Post shares PhRMA's concern that nearly two years after the agreement's entry into force and more than a year after President Ortega took office, the GON has not met these CAFTA-DR commitments. Industry representatives visited Nicaragua several times in 2007 to encourage officials at the Ministry of Health (MINSa) and Ministry of Trade, Industry, and Development (MIFIC) to implement these CAFTA-DR requirements. Neither ministry took an active role in pushing for implementation in 2007, but on February 22, after receiving notification that PhRMA had named Nicaragua in its 2008 Special 301 submission, MIFIC Minister Solorzano wrote Health Minister Gonzalez seeking his cooperation on test data protection. On agricultural chemical test data, a representative of CropLife Latin America reports that the Nicaraguan Ministry of Agriculture and Livestock has established an effective system.

LIMITED PROGRESS ON IPR ENFORCEMENT

19. (SBU) In 2007, the GON conducted 20 raids and the police seized 58,547 pirated DVDs, 21,629 CDs, 13 computers, 3 multi-purpose copiers, and other audiovisual equipment worth approximately \$123,000. For 2008, the National Police launched a public awareness campaign in three major open markets in Managua to inform vendors who sell pirated goods that they risk arrest. Government officials say that in March the police will begin to seize pirated goods and arrest the vendors in those markets.

110. (SBU) In July 2007, the GON successfully prosecuted a case in a local court against a Nicaraguan citizen selling pirated music CDs. In the case, originally filed in 2005, the offender was sentenced to

two years in prison -- later reduced to parole -- and fined 5,000 cordobas (\$267). Indeed, GON officials complain about the courts' slow adjudication of IPR cases. The Prosecutor General's Office filed 17 IPR cases in 2006 and 2007, but the courts have not ruled on any of them. The Prosecutor General and National Police are currently investigating 28 intellectual property cases for possible prosecution.

COOPERATION AND TRAINING

¶11. (SBU) GON officials and industry are cooperating to combat piracy, trademark infringements, and copyright violations. A representative of Nicautor, an association that advocates IPR enforcement and protection for book authors and music companies, said the police and public prosecutors normally respond promptly to formal complaints on IPR crimes. GON officials noted that they and industry representatives are meeting to finalize an IPR best practices manual they began drafting in a USG-funded IPR training course in December 2007 (Ref C). One Nicautor representative added that GON officials and industry representatives may establish an interagency working group on IPR enforcement.

COMMENT AND RECOMMENDATION

¶12. (SBU) Unfamiliarity with IPR issues among new Health Ministry officials and a lack of interagency cooperation within the GON, now that the Technical Secretariat of the Presidency has been disbanded, complicate implementation of CAFTA-DR commitments on test data protection and patent linkage. We are not sure what is behind the repeal of legislation providing for ex officio investigation of IPR crimes and stronger sentences for copyright violators. Poor interagency coordination is at least partly to blame, as we do know that law enforcement officers and trade officials have been caught by surprise by what is happening. We suspect that the rest of the blame belongs with National Assembly politics and special interests.

¶13. (SBU) On the positive side, MIFIC appears to have the political will to tackle the issues raised by PhRMA and to force the government to take a closer look at implications to CAFTA-DR embodied by changes to the Criminal Code. We have seen interagency cooperation at the working level on the IPR best practices manual. We are building a relationship with key officials and are committed to helping their staff members participate in USG-funded IPR training with the U.S. Patent and Trademark Office and the Department of Justice's Office of Overseas Prosecutorial Development, Assistance, and Training.

¶14. (SBU) Post believes that more engagement with mid-level and senior-level GON officials will encourage Nicaragua to enhance its IPR enforcement and protection efforts in compliance with CAFTA-DR. The Embassy has good communication with GON working-level counterparts on IPR. However, IPR is a low priority for mid- and senior-level officials. We would like to work with these officials over the course of the year to raise the profile of IPR and find a way to resolve these CAFTA anomalies. In lieu of naming Nicaragua to the 2008 Special 301 Watch List, we recommend that a senior Washington-based official pen a letter to President Ortega outlining our IPR concerns in terms of CAFTA-DR commitments. We would follow up at the ministerial level and with members of the National Assembly. We believe that naming Nicaragua to the Watch List this year could result in a negative political reaction that would complicate our efforts to help Nicaragua comply with its CAFTA-DR IPR commitments.

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